

Freedom of Information and Protection of Individual Privacy

OVERVIEW AND GUIDELINES



Ministry
of the
Environment

MINISTRY OF THE ENVIRONMENT

FREEDOM OF INFORMATION ACT

OVERVIEW AND GUIDELINES

INTRODUCTION

The Freedom of Information and Protection of Individual Privacy Act introduces the philosophy that all information under government control should be available to the public, unless the public's access to that information is specifically restricted by the terms of the Act. At the same time, the Act seeks to protect individual privacy by making "personal information" one of the exemptions to the public's general "right to know".

The other important exemption to the public's general "right to know" are records that reveal trade secrets or scientific, technical, commercial, financial or labour relations information.

This document sets out the general principles involved in the Act, with comment on how these are intended to be applied. In any case of doubt, the request should be referred further up the ladder, to the "head" himself if necessary, through the Ministry's Freedom of Information Office which will seek opinion from the Legal Services Branch as required.

GENERAL OBLIGATION UNDER THE ACT

The general obligation under the Act is that requests for access to information will be made in writing to a "Head" of an "institution". The "Head" will be the Minister, but the Minister will have the power to delegate his duties under the Act to one or more subordinates. The Director of the Administrative Services Branch has been appointed the FOI Co-ordinator, assisted by an FOI Administrator. The Ontario Ministry of the Environment is an "institution" for the purposes of the Act; experienced employees of the Ministry will carry out the searches for requested information, under the supervision of the Head and his subordinates.

Although requests for access to information are specified as being "in writing" (section 24 of the Act), there are two provisos. First, in an appropriate case, nothing prevents access to information being given in response to an oral request, or even in the absence of a request (Sec. 63(1)). Second, the Act shall not be applied in such a way as to preclude access to information (other than personal information) to which the public had access by custom or practice prior to the Act coming into force (Sec. 63(2)). Adherence to the Act should not make it harder for the public to get information.

DIRECTORIES

The government will be publishing Directories setting out all the Ministries, Branches, Agencies, etc. as well as listing each and every category of General and Personal Information Banks (i.e., types of files) it maintains. The citizen may be charged fees based on hourly rates for government employees' search time (s.57). The Ministry employee is under an obligation to assist the applicant to narrow or reformulate the request to enable it to be answered most expeditiously (s.24(2)). The applicant must also be given a reasonable estimate of the cost of the search, if it is going to exceed \$25.00 (s.57(2)).

The request can be transferred to another Ministry if they can deal with it more appropriately (s.25).

In addition to the Directories, the government will be obliged to publish and make available to the public any interpretations and guidelines issued to government officers for the carrying out of their duties to the public (s.33).

"ROUTINE" REQUESTS

It has always been the policy of the Ministry to be open about the information it has, and it is not the intention of the Act or the Ministry that this should change.

Accordingly, any requests for information which were routinely received and responded to by telephone or letter prior to the Act can continue to be handled in the same way after the Act comes into force, with one important exception: this is not only a Freedom of Information Act, but also a Protection of Individual Privacy Act; employees therefore have to be on the lookout for any inquiries which raise issues involving "personal information" or "trade secrets".

If a request may touch on these areas (or if the request is for any other reason a sensitive one), the inquirer should be asked to submit the request via the more formalized written procedure and an offer made to send or provide the Form for this purpose.

In theory, even information which is exempt from disclosure under the Act can nonetheless be disclosed if it was customarily disclosed prior to the Act; however, you should seek guidance from your Branch/Region/Agency FOI liaison officer or supervisor or the Ministry's FOI Office, before relying on this ground to release information which the Act appears to exempt from disclosure. And remember that "personal information", even if customarily released prior to the Act, is now protected.

Some sections of the Act say that information which should otherwise be kept confidential may be released "where the public

interest in its disclosure outweighs the competing interest in its being kept confidential." Obviously, this sort of "balancing" test (which generally applies to very delicate types of information) should be performed only by senior personnel.

RESPONSE TIME (SECTIONS 26 & 27)

Once a formal written request for access to information under the Act is received, we have to respond to that request within 30 days (i.e., within about 22 working days). Within that time, we must be able to:

- i. become aware of the request
- ii. interpret the request
- iii. determine whether the request falls within this Ministry's purview or whether the request should be transferred to another institution.
- iv. identify the information sought
- v. locate the information
- vi. review the information to determine whether any restrictions on disclosures apply
- vii. if restrictions do apply, determine whether the record can be released in part
- viii. if the information is going to be disclosed only in part, or if access is going to be refused, draft a notice to the applicant explaining the reason for that decision with citations to specific sections of the Act and why they apply, and
- ix. if the information sought involves trade secrets or personal information, and it is proposed to release such information, draft an appropriate notice to the affected third party

Provision is made in section 27 of the Act for an extension of time to comply where the request is for a large number of records, or where a great volume of material must be searched through, or where lengthy consultations will have to precede the decision on disclosure or non-disclosure. Two important features of this section should be noted:

- i. "we're too busy with other requests" "don't have time" or "not enough staff", are not justifications under the Act for taking longer than 30 days to reply to a request, and

- ii. while the extension of the time limit may be "for a period of time that is reasonable in the circumstances", only one such extension is available - further extensions cannot be made, so the period of extension will have to be carefully chosen to ensure that the response can be given within the extended time period.

Where section 27 is being invoked, instead of giving the applicant notice within 30 days as to whether the request for access to information is being approved or rejected, a statement of the reason for the extension must be given, as well as the length of the extension, and the fact that the applicant has a right to appeal the extension to the Commissioner. (The "Commissioner" is the Information and Privacy Commissioner appointed under the Act to hear appeals of all decisions made under the Act).

FORM OF DISCLOSURE (SECTIONS 26 & 30)

Where an access request is granted, the applicant is given a Notice to this effect, together with a copy of the records asked for. If photocopying would be impractical (or in other cases where sufficient reasons exist), the applicant may be permitted to inspect the original records. In order to save costs, a person may also ask to see the original records for the purpose of selecting those portions to be copied.

PENALTIES FOR NON-COMPLIANCE (SECTIONS 61 & 62)

Some penalties are provided for non-compliance with the Act. Anybody who willfully discloses personal information in contravention of the Act, or willfully maintains a data bank that contravenes the Act, or obtains or attempts to obtain personal information under false pretenses in contravention of the Act, can be fined up to \$5,000. Failure to comply with the time limits under the Act is deemed to be a refusal to give access to the information sought; this then triggers the applicant's right of appeal to the Commissioner.

Finally, civil proceedings can be brought against the Crown by anyone who suffers damages resulting from the improper disclosure or non-disclosure of any information under the Act, or from the failure to give a notice required under the Act. Civil servants dealing with requests under the Act are protected from liability provided they acted in good faith in making disclosure or non-disclosure or took reasonable care to give the required notices under the Act.

The threat of civil proceedings is particularly great when dealing with an inquiry touching on trade secrets or other proprietary information; disclosure of one company's secret information to a competitor could easily compromise the first company's position in the market place resulting in genuine,

substantial and provable economic loss; if the disclosure was made improperly, the Ministry would/could face an ensuing civil suit. Damages for "invasion of privacy" will undoubtedly be sought by individuals who allege that personal information about them was improperly disclosed to outside inquirers.

EXEMPTIONS FROM DISCLOSURE (SECTIONS 12 - 22)

The following types of information are exempt from disclosure. However, in some cases the exemption is mandatory (i.e., "the head shall not disclose..."), while in other cases the exemption is discretionary (i.e., "the head may refuse to disclose...").

Mandatory Exemptions from Disclosure:

- Cabinet records, including minutes of meetings of Cabinet or its committees, background papers, policy discussions, and draft legislation or regulations; however, disclosure is mandatory if the records involved are over twenty years old or if Cabinet consents to their disclosure. (Section 12)
- Records revealing trade secrets or scientific, technical, commercial, financial or labour relations information, which was supplied in confidence and where disclosure would prejudice someone's competitive position, result in similar information becoming unavailable to government in the future, or cause anybody to experience an undue loss or gain; any such information may be released where the public interest in its disclosure outweighs the private interest in non-disclosure or if there is consent to disclosure. (Section 17)
- Personal Information; such information can always be released to the individual to whom the information relates; it can also be released to third parties upon the prior written request or consent of the individual to whom the information relates. (Section 21)

Discretionary Exemptions from Disclosure

- Records of advice or recommendations to government by any public servant, consultant or other employee; this exemption is subject to numerous exceptions which are straight forward and need not be discussed in detail; for our purposes the most important types of information which would have to be disclosed under exceptions to this exemption would be: factual material, statistical surveys, environmental impact statements, feasibility studies or field research relating to policy proposals for government projects, and any final decisions or rulings of an

"officer" of the Ministry in the course of his decision making powers. All "advice-to-government" records more than twenty years old must be disclosed. (Section 13)

- Records relating to law enforcement matters and investigations, including anything that might reveal investigative techniques, disclose the identity of informants or endanger any person; because of the sensitive sorts of information which investigators sometimes turn up (such as criminal records), the head may refuse to even confirm or deny the existence of law enforcement records (i.e. "I will neither confirm nor deny that an investigation of XYZ Company took place in 1982, or that the company is currently being investigated"). Despite the foregoing, a report prepared in the course of routine inspection under an Ontario statute must be disclosed. (Section 14)
- Records which would prejudice relations of one governmental body with another or reveal confidential information received from other governments; the head may disclose such records only with Cabinet approval. (Section 15)
- Records prejudicing the defence of Canada or its allies; or records adversely affecting anti-espionage or anti-terrorist activities; these records shall not be disclosed without the prior approval of Cabinet. (Section 16)
- Trade secrets or financial, commercial, scientific or technical information belonging to the Government of Ontario; or information which could prejudice the economic interests of the Government of Ontario or one of its ministries; or information which would result in premature disclosure of a pending policy decision, or undue financial benefit or loss to a person; however, a head must disclose the results of environmental testing (unless it was done for a fee for a private organization, or was done simply as a means of developing test methods for the future); even where the financial or other interests of the Ontario Government are concerned, information would have to be disclosed if the public interest in this disclosure outweighed the interest of the Government of Ontario in its continued confidentiality. (Section 18)
- Records that are subject to solicitor/client privilege. (Section 19)

- Records whose disclosure could seriously threaten the safety or health of an individual. (Section 20)
- Records which are currently available to the public or which are going to be published within ninety days. (Section 22)

TRADE SECRETS, ETC. (SECTION 17)

It has been the experience in many jurisdictions which have adopted Freedom of Information legislation that a great volume of requests are received from industries seeking information on their competitors. The Ministry has great access to specialized information (both financial and technical) about various industries, not only in connection with various approvals which may have taken place, but also in connection with proposals which may be under discussion for new technology, as well as information from observations by officers of the Ministry in the course of normal monitoring practices.

Clearly, release of such information could easily enable one company to appropriate the benefit of another's research, steal their customers, etc. For this reason safeguards have been built into the Act.

First, however, it is important to understand that, although reference has been made to "trade secrets", it is not only trade secrets that are covered by this Section. This Section also covers any scientific, technical, commercial, financial or labour relations information (even if it is not a trade secret), provided that the information meets certain criteria. In order to be protected from disclosure, the information must have been supplied to the Ministry in confidence. (This could mean either that there was an express verbal or written agreement with the industry that we would not disclose the information, or that, in all the circumstances, it was implied that we would not reveal the information.)

If the information meets this confidentiality test, then as long as it also meets one of the other three criteria set out below, it must be protected. The three criteria are that the information could reasonably be expected to:

- a. Prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
- b. Result in information of the same kind no longer being supplied to the Ministry, or
- c. Result in undue loss or gain to any person, group, committee or financial institution or agency.

Information which meets these criteria might still be required to be disclosed where the public interest in its disclosure outweighs the interest of any person, group of persons, or organization in its continued confidentiality, or if the person to whom the information relates consents to the disclosure.

REQUESTS FOR ACCESS TO "TRADE SECRETS" - TYPE INFORMATION
(SECTIONS 10(2), 28 & 29)

Special provisions apply when the Ministry receives a request for information which might include the sort of information protected under the "trade secrets" exemption.

First of all the person fielding the request should consider Section 10(2) of the Act, which permits him to delete the exempt information and release the rest of the record. This procedure is permissible unless the exempt information is not reasonably severable from the whole record, which means that the remainder has to make sense even in the absence of the excised information.

If the person dealing with the access request feels that the record is composed so substantially of exempt information that Section 10(2) would be of no help, he should probably issue a Notice of Refusal of the request on the grounds of sub-section 17(1) (the sub-section providing the exemption for trade secrets, financial and other information). A notice would be sent to the person making the request setting out that provision, together with the reason the provision applies to the record, and the name and office of the person responsible for making the decision to refuse access; the notice must also advise the inquirer that there can be an appeal to the Commissioner for review of that decision (see Section 29 for details of the contents of a Notice of Refusal). This action would funnel through the Ministry's FOI Office.

If the person dealing with the access request feels for some reason that the information requested should be disclosed despite the Section 17 prohibition (or, more likely, if there is some doubt as to whether the Section 17 prohibition really applies), Notice must be given to the third party (in fact, to every third party) to whom the information relates.

The Notice contains a statement that the Ministry intends to release a record which might affect the interests of the third party, and a statement that the third party may make representations within twenty days as to why the record should not be disclosed. At the same time, a Notice of Delay must be sent to the person who made the request advising that the Record could affect interests of another party and that decision on the release of the record will be delayed for twenty-one days in order to give the other party an opportunity to make representations concerning disclosure. This procedure

(including advising the requesting party of his right to appeal the Notice of Delay) is set out in Section 28 of the Act.

After the twenty day period has expired, consideration will be given to any representations received and a decision made whether or not to disclose the record; a copy of the decision is sent to both parties. Access is not given until twenty days after the final decision, in order to give either party a chance to make an appeal to the Commissioner against the Ministry's decision. An appeal operates as a stay of the decision.

PERSONAL INFORMATION

Personal information means recorded information about an identifiable individual, including

- Information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation, or marital or family status of the individual
- Information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information related to financial transactions in which the individual has been involved
- Any identifying number, symbol or other particular assigned to the individual
- The address, telephone number, fingerprints or blood type of the individual
- The personal opinions or views of the individual except where they relate to another individual
- Correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence
- The views or opinions of another individual about the individual, and
- The individual's name where it appears with other personal information relating to the individual or where the disclosure of the information would reveal other personal information about the individual

This definition of "personal information" should be distinguished from the definition of "Personal Information Banks" which means a collection of personal information which is organized and capable of being retrieved. Something will not be a Personal Information Bank unless you can access it by means of

some sort of "personal identifier" like a person's social insurance number, employee number, name, etc. However, personal information will always be personal information regardless of how it is accessible.

No one can collect personal information on behalf of the Ministry unless the collection is expressly authorized by statute, used for the purpose of law enforcement, or necessary to the proper administration of a lawfully authorized activity (Section 38 (2) of the Act). There are safeguards in the Act as to the manner in which personal information shall be collected (Section 39), designed to ensure as far as possible that the information collected is accurate. There is also a requirement that the individual be notified when personal information is collected about him on behalf of the Ministry, although the Minister can waive this requirement (Sec. 39(2)).

Once the information has been collected, it may only be used within the Ministry for the purpose for which it was obtained or for a "consistent purpose" (defined in Sec. 43), or with the individual's consent or in accordance with other specifically specified situations. (Section 41 & 42(a)-(r)).

REQUESTS FOR ACCESS TO PERSONAL INFORMATION (SECTIONS 21, 10(2), 28, 29, 47, 48, 49)

The individual has a general right of access to any personal information about him/her and has the right to request a correction of incorrect information, and to file a "statement of disagreement" with the information which is on file (Section 47(2)). An individual's right of access to information about himself is subject to exceptions contained in Section 49 (e.g. information which would prejudice the physical or mental health of the individual, invade someone else's privacy, etc., fall within the exemptions in Sects. 12-22.).

Personal information may not be disclosed to others, except in accordance with section 21 which includes such things as disclosure:

- with the person's consent or on his instructions;
- in compelling circumstances affecting the health or safety of an individual,
- for research purposes under suitable terms and conditions for security and confidentiality, or
- if the disclosure does not constitute an unjustified invasion of personal privacy.

Sub-sections 21(2) and 21(3) detail the circumstances in which disclosure of personal information will be considered to constitute an unjustified invasion of personal privacy and deal with such considerations as the source of the request, the accuracy of the material and the sensitivity of the content.

Under these guidelines most people's financial and medical information would be protected under most circumstances (except for civil servants, whose classification, salary range, benefits and employment responsibilities are open to general inquiry - section 21(4)).

Requests for personal information fall into two categories: a person may request personal information about himself under Section 48 of the Act; or a general request for information under Section 24 of the Act might result in the disclosure of a record which happens to contain some personal information.

Where the request is made under Section 48 by an individual seeking personal information on himself, most of the procedures already discussed continue to apply. These include your obligation to assist the applicant in narrowing or reformulating an insufficiently particular request (Section 24(2)), your obligation to forward the request to another Ministry if they can deal with the request more appropriately (Section 25), your obligation to respond within thirty days (Section 26) or within the time period as extended under Section 27, and the requirement for notification to any third parties if their trade secrets or personal information about them would be included within the record to be disclosed (Section 28).

Before any disclosure of personal information is made to an individual, the person handling the request should consult Section 49 to see the exemptions (i.e., the types of personal information which do not have to be revealed even to the individual involved). These include some of the previously discussed exemptions like Cabinet records, advice to government, law enforcement, intergovernmental relations, defence of Canada, trade secrets etc., economic interests of Ontario, solicitor-client privilege, health or safety of an individual, and information soon to be published.

A disclosure request may also be refused where the disclosure would constitute an unwarranted invasion of another individual's personal privacy; or where the personal information contains evaluations or opinions about the applicant which were compiled for employment or contract purposes under circumstances where it was expected that such evaluations or opinions would be kept confidential.

The second type of request for personal information involves the situation where compliance with a general request for information under the Act would result in disclosure of a record containing personal information about an individual other than the person making the request. In this situation the person dealing with the request will go through all the usual procedures outlined above, and in particular, will give notice

to the other individual (or individuals) whose personal information is included in the record applied for.

This is done under Section 28 of the Act, and the twenty day waiting period for representations, and the ensuring rights of appeal, discussed in connection with trade secrets apply here as well. Before the person dealing with the request gives any Section 28 Notices to Third Parties, he should first give consideration to whether the portions of the record containing personal information about third parties can be severed under Section 10(2), so that the record can be produced to the applicant without revealing any personal information about third parties.

SPECIAL ENVIRONMENTAL PROVISIONS

The Act contains several provisions relating specifically to environmental matters, and these should be borne in mind when fielding requests for information, whether over the phone or pursuant to the formal written request procedure.

Some of the special provisions which could come into play are the following:

1. Factual material - must be disclosed under Section 13(2)(a), and could conceivably include raw test data, monitoring results, and sampling data.
2. Statistical surveys - must be disclosed under Section 13(2)(b).
3. An environmental impact statement or similar record - must be disclosed under Section 13(2)(d).
4. A feasibility study or other technical study, including a cost estimate, relating to a government policy or project - must be disclosed under Section 13(2)(g), and could conceivably cover consultants' reports obtained for the purposes of imposing a control order, etc.; refusal to disclose might be justified on other grounds such as technical and financial information or trade secrets (Section 17).
5. A report containing the results of field research undertaken before the formulation of a policy proposal - must be disclosed under Section 13(2)(h).
6. Results of product or environmental testing (subject to some exceptions) - must be disclosed under Section 18(2)

7. A head must disclose any record to the public or persons affected if he has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public - Section 11; although the Act does not define "grave" for these purposes, it is to be presumed that the head could not have "reasonable and probable grounds to believe" that the threat was "grave" on the basis of raw data alone; he would have to have the opportunity for the data to be analyzed and to consider the report of the analyst before risking upset to the community by making revelations under this section. A notice procedure similar to Sec. 28 is contained in subsections 11(2)-(4), but in order to expedite the release of this type of information, the notice need only be given if "practicable", and there is no 20 day response period.
8. Apart from the Freedom of Information Act, various provisions in the Ministry's statutes require disclosure to be made upon request (eg., Section 18 EPA - Orders or Approvals; Section 24 PA - Orders; etc.).
9. Ministry statutes also contain provisions requiring certain information to be kept confidential (e.g., Section 130 EPA, Section 19 PA, Section 27 EAA). By virtue of Section 60 of the Freedom of Information Act, such confidentiality provisions will be overridden two years after the new Act comes into force unless Ministry statutes are specifically revised to provide otherwise.

SUMMATION

The Freedom of Information Act can be applied with reasonable certainty if the following four principles are borne in mind:

1. Disclosure is to be the rule, not the exception.
2. Any restrictions on disclosure must be justified by reference to specific sections of the Act.
3. Personal information must always be protected in the interest of individual liberties, and
4. Borderline cases should be dealt with only by way of written request and should be referred up the ladder of responsibility through the Ministry's Freedom of Information Office, with legal advice being obtained when necessary.

